YOUNG KEE CHAN & ORS

v.

PHILEO ALLIED FINANCE (M) BHD

HIGH COURT MALAYA, TEMERLOH
HISHAMUDIN YUNUS J
[CIVIL SUIT NO: 22-28-97]
22 MAY 2000

LAND LAW: *Charge - Registration - Validity of - Insufficient instrument - National Land Code 1965, s. 340(1)*

TRUSTS: *Powers - Power of Attorney - Substituted power of attorney - Restriction on power - Whether substituted attorney could have more rights or powers than original attorneys*

CONTRACT: *Parties - Signatories to agreement - Eleven names stated in preamble of agreement - Only two signatures appeared on execution page - Who where the parties to the contract - Whether contract bound all eleven*

The plaintiffs are co-proprietors of a piece of land. They granted a power of attorney ("the 1st power of attorney") to the 1st and 2nd plaintiffs to *inter alia*, appoint a property developer for the purpose of developing the land. Subsequently, the 1st and 2nd plaintiffs entered into an agreement ("the Agreement") with Proven Development Sdn Bhd ("Proven") to develop the land. Although all of the plaintiffs were named at the commencement part of the Agreement, only the signatures of the 1st and 2nd plaintiffs appeared on the execution page.

Article 4A of the Agreement conferred an irrevocable power of attorney ("2nd power of attorney") on Proven to do certain acts. Armed with this, Proven charged the land to the defendant. Several years later, the plaintiffs were served with a Form 16D notice by the defendant. Upon the defendant's refusal to discharge the charge, the plaintiffs commenced an action against the defendant and later filed the instant application for summary judgment. The plaintiffs alleged that the registration of the charge was without their knowledge. They contended that the charge was registered by the defendant by means of an insufficient instrument and was therefore

null and *void*.

The issues raised before the court were (i) whether art. 4A(v) gave Proven the power to charge the land; (ii) who were the parties to the Agreement; (iii) whether the 2nd power of attorney was restricted by the 1st power of attorney; and (iv) whether the charge was effected by means of an insufficient instrument.

Held:

[1] The 1st and 2nd plaintiffs signed the Agreement in their own behalf as co-proprietors as well as the attorneys of the other co-proprietors. This was because there were clear averments which were not rebutted by the defendant, in paras. 6 and 7 of the plaintiffs' affidavit (deposed by the 1st and 2nd plaintiffs on behalf of all the plaintiffs) explaining the same.

[2] Although the agreement was not an agreement between Proven and all the plaintiffs, it may be enforced against all the co-proprietors/plaintiffs by Proven and *vice versa*. This is because, the agreement was an agreement between the 1st and 2nd plaintiffs as co-proprietors and also as the attorneys of the other co-proprietors and Proven.

[3] The 2nd power of attorney did not empower Proven to charge the property to the defendant.

[4] Furthermore, as the 2nd power of attorney was created by virtue of para. 10 of the 1st power of attorney, it was a substituted power of attorney. Therefore, Proven being a substituted attorney could not have more rights or powers than the original attorneys. Thus, the charge was effected by means of an insufficient instrument.

[Application allowed with costs; charge declared null and void.]

Case(s) referred to:

Bryant, Powis and Bryant v. La Banque du Peuple [1893] AC 170 ***(refd)***

Rafeah Ahmad (the Representative of Hj Hassan Hj Arshad, deceased) v. Bank Bumiputra Malaysia Bhd [1995] 2 CLJ 997 ***(refd)***

Subramania Pillay v. Sundaramal [1968] 2 MLJ 115 ***(refd)***

Legislation referred to:

National Land Code 1965, ss. 254, 340(1), (2)(b)

Rules of the High Court 1980, O. 14

Other source(s) referred to:
Drafting Commercial Agreements, AGJ Berg, 1991, Butterworth p 14
Halsbury's Laws of England, 4th edn, vol 1(2), p 39 paras 46-47, p 96 para 137
Powers of Attorney, Trevors Aldridge, 8th edn Longman pp 1, 62

For the plaintiffs - Francis Tan; M/s Rosni, Francis Tan & Ho
For the defendant - Ting Heng Peng; M/s Amin-Tan & Co

Reported by Izzaty Izzuddin

JUDGMENT

Hishamudin Yunus J:

This is an interlocutory application (encl. 14) by the plaintiffs for summary judgment against the defendant pursuant to O. 14 of the Rules of the High Court 1980.

The plaintiffs are the registered proprietors of a piece of land known as GM 640, lot 1642, Mukim of Semantan, District of Temerloh, Pahang (hereinafter referred to as "the property") as well as two other adjoining parcels of land (which are not the subject matter of the present suit). They were keen to develop the land (together with the two other adjoining parcels of land) to transform it into a housing estate. Accordingly, on 1 August 1989 the third, fourth, fifth, sixth, seventh, eighth, ninth, tenth and eleventh plaintiffs granted the first and second plaintiffs an irrevocable power of attorney (in this judgment I shall be referring to this power of attorney as "the first power of attorney"). This power of attorney empowers the attorneys to appoint a property developer for the purpose of the intended development. Paragraphs 1 and 2 of this power of attorney state:

> 1. To enter into an agreement with any reputable Housing Developer Company for the purpose of developing the aforesaid lands into a housing estate or a new town subject to the terms and conditions as our attorneys may think proper, fit and necessary.
>
> 2. The attorneys shall have power to charge or mortgage or transfer the lands as the attorney think proper, fit and necessary in so far as the Developers lots is concerned and for that purpose to sign all the necessary documents.

This power of attorney also empowers the attorneys to appoint substituted attorney (or attorneys) having the same powers as, or less powers than, them. Paragraph 10 of this power of attorney reads:

10. To substitute and appoint from time to time one or more attorney or attorneys with the same or more limited powers and such substitute or substitutes at pleasure to remove and another or others to appoint.

Subsequently, on 16 March 1990 the first and second plaintiffs entered into a joint venture agreement (hereinafter referred to as "the agreement") with a company known as Proven Development Sdn Bhd (hereinafter referred to as "Proven") who undertakes to develop the land. Under this joint-venture agreement, Proven is to build houses, shop-houses and infrastructures on the land. A certain number of houses and shop-houses that are to be built by Proven would be allotted to the owners of the land (*ie*, the plaintiffs) when once completed. The rest of the houses and shop-houses would be allotted to Proven.

At the formal commencement part of the agreement, it is stated that the agreement is between all the eleven plaintiffs (*ie*, all the registered proprietors of the property) – and they are all named – and Proven. It reads:

> **AN AGREEMENT** made the 16th day of MARCH, 1990 BETWEEN YOUNG KEE CHAN (NRIC NO: 1325160), YONG KEE CHIN @ YONG KEE YOON (NRIC NO: 1322164), WONG AH CHOP (NRIC NO: 1325182), YOUNG KEE CHEONG (NRIC NO: 0258423), YONG KEE CHOON @ YONG KEE KUAN (NRIC NO: 1322222), YONG KAM (NRIC NO: 7707740), YONG KHEE YEN (NRIC NO: 0565934 E), YONG KEE KWANG (NRIC NO: 7702544), YONG AH CHIN (NRIC NO: 1325185), YONG CHEE MOI (NRIC NO: 0924788), YOUNG MOI CHIN @ YOUNG AH MOI (NRIC NO: 7707781) all care of No: 52, Jalan Besar Lanchang, 28500, Lanchang, Temerloh, Pahang Darul Makmur (hereinafter called "the Owners') of the one part AND **PROVEN DEVELOPMENT SDN BHD** a Company incorporated in Malaysia having its place of business at No: 108, Taman Berlian, 27000 Jerantut, Pahang Darul Makmur, Malaysia (herenafier called "the Developer') of the other part.

However, notwithstanding the above provisions, of all the plaintiffs, only the first and second plaintiffs signed the agreement with Proven. The rest of the plaintiffs did not. This is borne by the fact that only the signatures of the two plaintiffs appear on the execution page (that part of the agreement where the parties are to sign). The signatures of the rest of the plaintiffs do not appear.

It is also important to observe that there is nothing in the agreement that states that the first and second plaintiffs are attorneys of the nine other co-proprietors mentioned in the agreement, or are authorised to execute the agreement as the attorneys of the nine others or on their behalf. Indeed,

there is nothing at all in the agreement to show that the two plaintiffs are attorneys. Looking at the agreement **objectively**, the two plaintiffs appear to have signed the agreement in their personal capacity and on their own behalf – not on behalf, or as attorneys, of anyone else.

However, in paras 6 and 7 of the plaintiffs' affidavit (deposed by the first and second plaintiffs on behalf of all the plaintiffs) at encl. 13, it is averred that the first and second plaintiffs signed the agreement on their own behalf as well as the attorneys of the other plaintiffs/co-proprietors pursuant to the power of attorney. The paragraphs read as follows:

> 6. Pada 16hb. Mac, 1990 kami telah menandatangani satu perjanjian usahasama dengan sebuah syarikat yang bernama Proven Development Sdn. Bhd. untuk memajukan tanah-tanah tersebut. Satu salinan perjanjian tersebut dilampirkan dan ditandakan "C".
>
> 7. Kami telah menandatangani perjanjian tersebut **bagi pihak diri kami serta bagi pihak Plaintif-Plaintif yang lain menurut kuasa-kuasa yang telah diberikan kepada kami melalui SKW tersebut**. (emphasis added)

It is important to note that *"Kami"* in paras. 6 and 7 above refers only to the deponents, that is to say, the first and second plaintiffs. The introductory part and para. 1 of the affidavit states:

> **AFIDAVIT**
>
> Kami, YOUNG KEE CHAN (K/P: 320908-06-5019) DAN YONG KEE CHAN (K/P: 380716-71-5165) adalah warganegara Malaysia yang cukup umur dan beralamat di No: 52, Jalan Besar, 28500 Lanchang, Pahang Darul Makmur dengan ini sesungguhnya berikrar dan menyatakan bahawa:
>
> i) Kami adalah Plaintif Pertama dan Kedua tindakan ini dan kami diarahkan oleh Plaintif-Plaintif yang lain mendepos affidavit ini bagi pihak mereka juga.

Now, a provision in the agreement confers on Proven an irrevocable power of attorney empowering the directors of Proven to do certain acts (in this judgment I shall be referring to this power of attorney as 'the second power of attorney'). Article 4A of the agreement provides as follows:

> 4A. Simultaneously with the execution of this Agreement the owners hereby grant the Developer an irrevocable Power of Attorney empowering the directors of the Developer to do the following acts namely:
>
> i) To deal with the relevant authorities with regard to the conversion, subdivision and issuance of separate documents of title to the said Land and in connection therewith to sign all necessary plans, documents or instruments relating thereto and if necessary to appear before the relevant authority or authorities.

ii) To submit and sign all building plans reinforced concrete plans and any other documents necessary and any amendments thereto to obtain approval from the relevant authority or authorities for the construction of buildings on the said Land.

iii) To apply to the relevant authority or authorities for the certficate of fitness for occupation of the said buildings when the said buildings are erected.

iv) To sell the said land known as the Developers Lots together with buildings erected thereon to anybody including to the attorney himself and for that purpose to sign the Sale and Purchase Agreement, Memorandum of Transfer and all the necessary documents to effect the transfer of the said Land known as the Developers lots.

v) To negotiate with any bank, finance company, insurance company or any other financial institution established and recognised by the laws of Malaysia to obtain financing required to complete the said project including pre-development funds: PROVIDED THAT the monies obtained therefrom be solely used for the use and completion of the Commercial/Housing project under this Agreement AND any liabilities arising from the said financing obtained by the Developer shall be borne solely by the Developer and in the event the Owners suffer any loss or damage from the said financing obtained by the Developer the Developer shall compensate and reimburse the Owners and the Directors of the Developer personally shall be jointly and severally liable to the Owner for the same. AND IT IS FURTHER PROVIDED THAT the Developer shall be entitled to use the titles herein for obtaining pre-develop[ment] funds and upon the issuance of the individual titles only the Developers lots can be charged to the Bank and the Owners' lots shall be free of encumbrances.

vi) To authorise the Developer to sign all the relevant documents to give effect to the Power of Attorney herein created and matters enumerated thereon.

The meanings of "Developers lots" and "Owners lots" are explained in art. 2 of the agreement. To put it simply, "Owners lots" are a specified number of units of shop-houses and houses to be built by Proven on the land, marked in red in the layout plan, which would be allotted to the plaintiffs as owners of the land. "Developers lots" means the remaining shop-houses and houses in the layout plan, which would belong to Proven. At the time when the land was charged to the defendant, and even at the time of the hearing of the present application, the individual titles to the proposed subdivided lots have yet to be issued by the land office.

Armed with this second power of attorney, Proven charged the land to the defendant, a financial institution, for the purpose of securing a loan of RM250,000. The charge was registered on 8 July 1993.

Several years later, in October 1997 the plaintiffs were served with a Form 16D notice (service of this notice is the initial stage of a foreclosure proceeding) pursuant to s. 254 of the National Land Code. On 22 and 23 October 1997 the plaintiffs' solicitor made a search at the land office, District of Temerloh, and discovered that the land had been charged by Proven to the defendant.

The plaintiffs allege in the statement of claim that the registration of the charge was without their knowledge. The defendant does not rebut this allegation.

Having discovered the charge, the plaintiffs' solicitor wrote a letter of protest to Messrs Amin-Tan & Co., the defendant's solicitors, and demanded the defendant to take steps to discharge the charge. But the defendant did not take any such action.

Hence, the plaintiffs filed the writ and statement of claim on 29 October 1997. In the main action, the plaintiffs are seeking, *inter alia:*

(a) a declaration that the charge on the property registered by the defendant be declared null and void; and

(b) an order that the registration of the charge be set side and the memorial of the charge be deleted from the Register of Titles and the issue document of title.

Proven is not a party to this action; nor did it file any affidavit on behalf of either the plaintiffs or the defendant.

The plaintiffs contend that the charge was registered by the defendant by means of an insufficient instrument and was, therefore, null and void. The plaintiffs further argue that by reason of sub-s. (2)(b) of s. 340 of the National Land Code the defendant cannot claim indefeasibility of interest under s. 340(1) of the same. The relevant provisions of the Code read:

> 340. **Registration to confer indefeasible title or interest, except in certain circumstances.**
>
> (1) The title or interest of any person or body for the time being registered as proprietor of any land, or in whose name any lease, charge or easement is for the time being registered, shall, subject to the following provisions of this section, be indefeasible.
>
> (2) The title or interest of any such person or body shall not be indefeasible –
>
> (a) ...

(b) where registration was obtained by forgery, or by means of an *insufficient* or void instrument; (emphasis added.)

It is the submission of the plaintiffs' counsel, Encik Francis Tan, that there is no serious question to be tried, and that what is in issue is purely the question of the interpretation of art. 4A (the second power of attorney) of the agreement; and he contends that art. 4A of the agreement is in essence a substituted power of attorney and does not give Proven the power to charge the land to the defendant. He argues that the words:

> ... and upon the issuance of individual titles only the Developers lots can be charged to the Bank and the Owners lots shall be free of encumbrances.

means that Proven could only charge the "Developers lots" (and this can only be done after the subdivisions have been approved by the relevant authority and individual titles for the subdivided lots have been issued); Proven could not charge the whole land (GM 640, Lot 1642) itself. He further submits that Proven, being a substituted attorney appointed by the attorneys of the first power of attorney, its power to charge the property is restricted by para. 2 of the first power of attorney.

The learned counsel for the defendant, Encik Ting Heng Peng, on the other hand, contends that art. 4A, that is to say, the power of attorney created by the agreement, in particular, the words:

> AND IT IS FURTHER PROVIDED THAT the Developer shall be entitled to use the titles herein for obtaining pre-develop[ment] funds.

empowers Proven to charge the land itself in order to raise funds for the purpose of the development project on the land. The learned counsel seeks to preserve the validity of the charge by relying on s. 340(1) of the Code (the principle of indefeasibility of title or interest). He further submits that the second power of attorney is neither a substituted power of attorney nor Proven a substituted attorney.

Now, before I deliberate on the interpretation of art. 4A and the status of Proven as an attorney, there is an issue that needs to be disposed first: Who actually are the parties to the agreement? The learned counsel for the plaintiffs submits that the agreement is an agreement between the first and second plaintiffs only, **in their own behalf and as attorneys of all the other co-owners**, on the one hand, and Proven as the other party. In other words, the other co-proprietors (that is to say, the third, fourth, fifth, sixth, seventh, eighth, ninth, tenth and eleventh plaintiffs), who are also the donors of the first power of attorney, are not parties to the agreement.

The learned counsel for the defendant, on the other hand, while accepting that the agreement is signed by the first and second plaintiffs as co-proprietors as well as the attorneys of all the other co-proprietors, however, contends that as the introductory part of the agreement mentions the names of **all** the plaintiffs/owners as parties to the agreement, therefore, the agreement is an agreement between **all** the eleven co-proprietors/plaintiffs and Proven.

But before I touch on these issues raised, I am unable to resist making the remark that I am tempted to regard this agreement as an invalid agreement. This is because of the following reasons. The formal commencement part of the agreement clearly states that all the eleven plaintiffs/registered co-proprietors are parties to the agreement. Yet on the execution page only two out of the eleven named in the agreement (*ie*, the first and second plaintiffs) signed the agreement: the rest did not. Second, as I have pointed out earlier, there is nothing in the agreement showing that the two plaintiffs entered into or signed the agreement as attorneys (indeed, not even as being on behalf of all the landowners – if at all this is worth anything). Thus, looking at the agreement **objectively** it is an incomplete agreement; in terms of ascertaining **who** actually are the parties to the agreement, the agreement does not make sense.

In *Powers of Attorney* by Trevors Aldridge (8th edn. Longman) the proper manner of executing an agreement or deed by an attorney is prescribed (at p. 62) as follows:

> The normal form of execution of a deed by an attorney is:
>
> AB (donor)
> by his attorney
> CD (attorney)
>
> An alternative is:
>
> CD (attorney)
> as attorney for and on behalf of
> AB [donor]

In *Drafting Commercial Agreements* by AGJ Berg (1991, Butterworth), it is stated (at p. 14):

> If a person will sign under a power of attorney, this should be stated:

SIGNED by
William Pyle Taunton
For and on behalf of
BOSANQUET AND PULLER PLC
Under a power of attorney
Dated 5th March 1991

To put the matter briefly, where a person signs an agreement as an attorney, the fact of signing as an attorney must be stated clearly at the execution clause. It is not a matter to be taken lightly or that could be just glossed over.

If the first and second plaintiffs had intended to enter the agreement on their own behalf as co-proprietors of the property as well **as attorneys**, and I have no doubt that that was their intention, then, judging the manner it is drafted, the agreement is highly irregular. The first and second plaintiffs should have made it clear that they were signing in their dual capacities: (1) as registered co-proprietors and parties to the agreement in their own right and (2) also as attorneys of the other co-proprietors/parties to the agreement. In other words, the signatures of the first and second plaintiffs at the execution page should not have been written in the manner that we now see it. It is difficult to understand how the defendant (and their legal advisers, if at all they had been consulted) could have accepted the second power of attorney, despite all these drafting flaws.

Be that as it may, upon deeper reflection, notwithstanding the misgivings that I have on the agreement, I am inclined to take the view that justice demands that I should resist the temptation to rule the agreement as invalid. To my mind, the wiser approach is to hold – and I so hold – that the two plaintiffs/co-proprietors, who signed the agreement, did so **in their own behalf as co-proprietors as well as the attorneys of the other registered co-proprietors**, and that the agreement is a valid agreement. I so hold on the basis of the following considerations. First, there are the clear averments in paras. 6 and 7 of the first and second plaintiffs' affidavit (which I have alluded to earlier in this judgment) explaining that the first and second plaintiffs signed the agreement in their own behalf and as attorneys of the other co-proprietors. Second, the averments therein are not rebutted by any of the defendant's affidavits. On the contrary, and as I have pointed out, the learned counsel for defendant, in his written submission, accepts that the two signed the agreement in their own behalf and as attorneys of the landowners. Third, between the plaintiffs and the defendant, it is common ground that the agreement is a valid agreement.

Accepting this as the position, I shall now revert to the question that I have earlier posed: **Who** entered the agreement with Proven? Is it an agreement between the first and second plaintiffs, **in their own behalf and as attorneys of the landowners**, on the one part, and Proven as the other party? Or, is it an agreement between all the eleven plaintiffs/registered co-proprietors and Proven?

The plaintiffs submit that it is an agreement between the first and second plaintiffs, in their own behalf and as attorneys of the other co-owners, and Proven; that the second power of attorney is in effect an exercise by the first and second plaintiffs, as attorneys, of their powers under para. 10 of the first power of attorney to appoint Proven as a substituted attorney; and that, bearing in mind the restriction on the power to charge imposed by para. 2 of the first power of attorney, the rights conferred upon Proven by the second power of attorney cannot be greater than the rights conferred upon the first and second plaintiffs by the first power of attorney.

The defendant, on the other hand, submits that the agreement is an agreement between all the eleven plaintiffs/registered co-proprietors and Proven; that the second power of attorney is independent of para. 10 of the first power of attorney; that Proven is not a substituted attorney; and that the rights conferred on Proven under the second power of attorney are not restricted by the provisions of the first power of attorney.

First, let us go to fundamentals and consider the meaning and purpose of a power of attorney. In *Powers of Attorney* referred to earlier, "power of attorney" is defined as follows (at p. 1):

> 3. **Definition: power of attorney**
>
> A power of attorney is a document by which one person ('donor') gives another person ('attorney') the power to act on his behalf and in his name. It may be completely general, entitling the attorney to – almost – everything the donor could himself do, or it may be limited to certain defined objects.
>
> The practical purpose of a power of attorney is not only to invest the attorney with power to act for the donor, but also to provide him with a document defining the extent of his authority, which he can produce as evidence to the third parties with whom he is to deal.

A power of attorney creates a principal-agent relationship between the donor and the donee. As a general principle of agency, any contract made by an agent with the authority of his principal may be enforced by or against the principal where his name or existence was disclosed to the other contracting party at the time when the contract was made (see *Halsbury's Laws of England* 4th edn. vol. 1(2), p. 96, para 137).

In my judgment, the agreement is an agreement between the first and second plaintiffs, as co-proprietors as well as the attorneys of the other registered co-proprietors of the property, and Proven. It is true that the names of the nine other co-proprietors are mentioned at the formal commencement part of the agreement as parties to the agreement. But this fact **by itself** does not make all the nine others parties to the agreement. They are not parties if they are not signatories to the agreement. Their names are mentioned merely because, as a matter of practice, it is advisable and convenient for an attorney to exercise the powers granted to him **in the donor's name**. In *Powers of Attorney* (earlier referred to), it is stated (at p. 62):

> **1 Using donor's name**
>
> It is generally advisable and convenient for an attorney to exercise the powers granted to him in the donor's name. If he contracts in his own name, and he can generally choose that alternative, the third party with whom he is dealing will not be put on notice that the attorney is contracting on the donor's behalf. The attorney then runs the risk of incurring personal liability.

I must, however, add that although the agreement is not an agreement between all the named registered co-proprietors and Proven, nevertheless the agreement is not only an agreement entered into by the two plaintiffs in their own capacity as co-proprietors but is also an agreement entered into by the two attorneys in the name and on behalf of the other co-proprietors; and the agreement, provided the terms thereof are within the scope of the first power of attorney, is binding on the donors (*ie*, the other co-proprietors). In other words, the agreement may be enforced against all the co-proprietors by Proven and *vice versa*.

Now, the principle is that powers of attorney are to be construed strictly. In *Bryant, Powis and Bryant v. La Banque du Peuple* [1893] AC 170, the Privy Council said (at p. 177):

> ... powers of attorney are to be construed strictly – that is to say, that where an act purporting to be done under a power of attorney is challenged as being in excess of the authority conferred by the power, it is necessary to shew that on a fair construction of the whole instrument the authority in question is to be found within the four corners of the instrument, either in express terms or by necessary implication.

The above principle was adopted by the Federal Court in *Subramania Pillay v. Sundaramal* [1968] 2 MLJ 115 (and see also *Rafeah binti Ahmad (the Representative of Hj Hassan bin Hj Arshad, deceased) v. Bank Bumiputra Malaysia Berhad* [1995] 2 CLJ 997).

The other principle is that:

> General words used in conferring the power (in the power of attorney) are construed as limited by reference to the special powers conferred, but incidental powers necessary for carrying out the authority will be implied. (*Halsbury's Laws of England* 4th edn. vol. 1(2), p. 39, para 46.)

Bearing the above principles in mind, in my judgment, the power of attorney granted to Proven (*ie*, the second power of attorney) does not empower the company to charge the property to the defendant. First, the words (the "first limb"):

> AND IT IS FURTHER PROVIDED THAT the Developer shall be entitled to use the titles herein for obtaining pre-develop[ment] funds ...

appearing in sub-para. (v) of para. 4A in the second power of attorney cannot be read in isolation. They must be read together with the following words (the "second limb") that immediately follows:

> ... and upon the issuance of individual titles only the Developers lots can be charged to the Bank and the Owners lots shall be free of encumbrances.

I consider the first limb as powers conferred by "general words" and the second limb as conferring the "special powers". I consider the second limb as conferring special powers because the powers are spelt out more in detail and is more specific (for example, the words "charged", "Bank", "Owners lots" and "free of encumberances" are specifically mentioned), as compared to the powers in the first limb, which are vaguely worded. Applying the principle as stated in *Halsbury's* (as I have cited), the special powers limit the powers conferred by general words. In other words, when both limbs are read together, as follows:

> AND IT IS FURTHER PROVIDED THAT the Developer shall be entitled to use the titles herein for obtaining pre-develop[ment] funds and upon the issuance of individual titles only the Developers lots can be charged to the Bank and the Owners lots shall be free of encumbrances.

the whole proviso must be taken to mean:

(a) that the property can be charged by Proven to a bank only after individual titles have been issued (at the time of the hearing of the present case they are yet to be issued);

(b) that only the lots allotted to Proven ("Developers lots") can be charged; and

(c) that the lots allotted to the plaintiffs/registered proprietors ("Owners lots") are to be free from any encumbrances.

There is, however, another reason why I hold that Proven has no power to charge the property. The second power of attorney was created by virtue of para. 10 of the first power of attorney. It is a substituted power of attorney. As such it must be read as being subject to para. 2 of the first power of attorney. This para. 2 clearly restricts the first and second plaintiffs' right to charge the property. That paragraph reads as follows:

> 2. The attorneys shall have power to **charge** or mortgage or transfer the lands as the attorneys think proper, fit and necessary **in so far as the Developers lots is concerned** and for that purpose to sign all the necessary documents. (emphasis added)

It is clear from the above provision that the power of the attorneys under the first power of attorney to charge the property was restricted. Now, in my opinion, the principle must be that Proven, being a substituted attorney, cannot have more rights or powers than the original attorneys (the first and second plaintiffs). It is clear from para. 2 above that the first and second plaintiffs, under the first power of attorney, could only charge the lots allotted to the developer. The two could not charge the whole land. If the original attorneys could not charge the whole land, the substituted attorney too could not.

It follows, therefore, that when Proven charged the property to the defendant by relying on the second power of attorney, it had relied on an instrument that did not confer on it the right to do so. In other words, the charge was effected by means of an insufficient instrument. The charge, therefore, is not valid. It is null and void. Section 340(1) of the National Land Code does not protect such an interest.

In *Halsbury's* referred to earlier in this judgment, it is stated (at p. 39, para 47):

> There must be strict adherence to the authority conferred by power of attorney. If the agent in the pretended exercise of his authority acts in excess of and outside the reasonable scope of its special powers, the third party will be unable to make the principle liable.

Based on the reasons given above, I am satisfied that there is no defence to the plaintiffs' claim.

This application for summary judgment is granted with costs.